

STATE OF MICHIGAN  
COURT OF APPEALS

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SEAN R. DUFF,

Plaintiff-Appellant,

v

CITY OF LINCOLN PARK,

Defendant-Appellee.

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UNPUBLISHED

January 10, 2012

No. 299694

Wayne Circuit Court

LC No. 10-001775-CK

Before: MURRAY, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Sean R. Duff appeals as of right the trial court's order granting summary disposition in favor of the City of Lincoln Park ("the City").<sup>1</sup> We affirm.

Duff brought this action challenging a \$250 emergency cost recovery fee that the City charged in connection with Duff's arrest for operating a motor vehicle while under the influence of liquor (OUIL). Duff's complaint contains three counts, styled as "intentional misrepresentation and fraud," "breach of implied/express contract," and "class action allegations." On appeal, Duff only challenges the dismissal of his claim for misrepresentation and fraud. Duff asserts that the City intentionally misrepresented that he owed \$250 as reimbursement for emergency response services and costs arising from the incident that led to his arrest, and that the City perpetrated this fraud and misrepresentation on thousands of persons similarly situated.

A motion brought under MCR 2.116(C)(10) "tests the factual sufficiency of the complaint."<sup>2</sup> Summary disposition may be granted when "the proffered evidence fails to

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<sup>1</sup> MCR 2.116(C)(10).

<sup>2</sup> *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).

establish a genuine issue regarding any material fact[.]”<sup>3</sup> This Court reviews a trial court’s decision on a motion for summary disposition de novo.<sup>4</sup>

Although the parties direct their arguments on appeal as to whether the City’s ordinance or MCL 769.1f authorized the City’s assessment of \$250 in costs, the context of the dispute is Duff’s cause of action for “intentional misrepresentation and fraud.” A claim for fraud and misrepresentation requires proof of the following elements:

(1) [t]hat [the] defendant made a material representation; (2) that it was false; (3) that when [the defendant] made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that [the defendant] made it with the intention that it should be acted upon by [the] plaintiff; (5) that [the] plaintiff acted in reliance upon it; and (6) that [the plaintiff] thereby suffered injury.<sup>5</sup>

MCL 769.1f states, in pertinent part:

(1) As part of the sentence for a conviction of any of the following offenses, in addition to any other penalty authorized by law, the court may order the person convicted to reimburse the state or a local unit of government for expenses incurred in relation to that incident including but not limited to expenses for an emergency response and expenses for prosecuting the person, as provided in this section:

\* \* \*

(2) The expenses for which reimbursement may be ordered under this section include all of the following:

(a) The salaries or wages, including overtime pay, of law enforcement personnel for time spent responding to the incident from which the conviction arose, arresting the person convicted, processing the person after the arrest, preparing reports on the incident, investigating the incident, and collecting and analyzing evidence, including, but not limited to, determining bodily alcohol content and determining the presence of and identifying controlled substances in the blood, breath, or urine.

Contrary to Duff’s contentions, the statute does not limit recoverable expenses to those related to an emergency response. The statute states that expenses subject to reimbursement

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 118.

<sup>5</sup> *Lawrence M Clarke, Inc v Richco Constr, Inc*, 489 Mich 265, 284; 803 NW2d 151 (2011) (citation and quotation marks omitted).

include “expenses incurred in relation to that incident including but not limited to expenses for an emergency response and expenses for prosecuting the person[.]”<sup>6</sup> Furthermore, the statute expressly includes salaries for law enforcement personnel for responding to the incident, processing the person, preparing reports, investigating the incident, and collecting and analyzing evidence.<sup>7</sup> The first seven items of officer time listed as arrest costs on the City’s itemization exceed the \$250 that Duff was ordered to pay. Colleen Snethkamp, the City’s Administrative Systems Manager assigned to the City of Lincoln Park Police Department, explained her calculations in her deposition. Duff notes that Officer Shawn Noe did not earn \$54.22 an hour as charged in Snethkamp’s itemization. Snethkamp, however, explained that she calculated the cost per minute by taking Noe’s salary divided by hours worked, multiplying by a “benefit rate” of 1.54, and then dividing by 60 minutes. Duff does not address that formula and thus has not shown that it does not accurately calculate the City’s expense for the officer.

Duff’s reliance on a Supreme Court Administrative Office memorandum dated May 6, 2010, is misplaced. The memorandum begins, “Courts have asked what costs of investigation, arrest, and prosecution of criminal offenses may be recovered by local units of government. Only specific expenses incurred for crimes enumerated in MCL 769.1f, or direct monetary loss or damage suffered by a governmental entity during the commission of a crime may be recovered.” The portions of the memorandum on which Duff relies concern the ability to recover costs in cases in which MCL 769.1f is not applicable.

Although we are not persuaded by Duff’s argument that the costs in question are not within the scope of MCL 769.1f, there are other reasons not specifically argued by Duff that make the City’s reliance on the statute as authority for its assessment of the costs problematic. The statute provides that recoverable costs may be imposed by a court as part of the sentence for a conviction of a specified offense.<sup>8</sup> The statute does not authorize a city to impose or assess costs on its own, regardless of whether the costs are within the scope of the statute. Therefore, the City cannot rely on the statute as authority for its extra-judicial assessment of costs. Nonetheless, the City submitted evidence that the same costs were imposed by the court in Duff’s criminal case in which he was convicted of OUIL, and that Duff’s payment of the costs pursuant to the City’s separate assessment was credited against those court-imposed costs.

The appropriate method for challenging the court-imposed costs in Duff’s criminal case would be through an appeal in that case. Duff is not entitled to collaterally attack the validity of his criminal conviction, and any attendant penalties imposed as a consequence of that conviction, in a separate civil lawsuit.<sup>9</sup> Duff did not submit any evidence disputing the City’s evidence that the same costs were imposed in Duff’s criminal case, or that Duff received credit for those court-imposed costs by virtue of his payment of the assessment at issue in this case. Further, Duff did

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<sup>6</sup> MCL 769.1f(1).

<sup>7</sup> MCL 769.1f(2)(a).

<sup>8</sup> MCL 769.1f.

<sup>9</sup> See *People v Howard*, 212 Mich App 366, 369; 538 NW2d 44 (1995).

not submit any evidence indicating that he had appealed the court-imposed costs in his criminal case, or that those costs were ever found to be invalid.

In order to prevail on a claim for fraud and misrepresentation, Duff must be able to establish that he suffered an injury.<sup>10</sup> Because the submitted evidence shows that the same costs were imposed in Duff's criminal case, the validity of which has not been disputed, and that Duff's payment to the police department was credited against those court-imposed costs, the City's alleged misrepresentations did not cause Duff to suffer any injury. Therefore, Duff's claim for fraud and misrepresentation cannot succeed. Accordingly, we affirm the trial court's order granting summary disposition in favor of the City, albeit for different reasons.

Because there is no genuine issue of material fact that Duff did not suffer any damages caused by the City's alleged misrepresentations, it is unnecessary to consider whether the charges were also permitted under the City's ordinance.

Affirmed.

/s/ Christopher M. Murray  
/s/ Michael J. Talbot  
/s/ Deborah A. Servitto

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<sup>10</sup> *Lawrence M Clarke, Inc*, 489 Mich at 284.